Supreme Court, U.S.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY LAYNE ROGERS, SR.,
Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections, State of Florida,

BRADLEY D. CARTER,
Warden, Union Correctional Institution, Raiford, Florida,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred as a matter of law in concluding that Petitioner's federal habeas corpus petition was procedurally barred under state law, when the only state court to issue a written opinion in this matter accepted Petitioner's arguments that the state procedural bar was inapplicable and instead addressed his claim on the merits.

2. Whether the Eleventh Circuit erred as a matter of law in denying a certificate of appealability when "jurists of reason" could disagree whether Petitioner's timely-filed state post-conviction proceeding, which the state court addressed on the merits, effectively tolled the one-year federal statute of limitations under 28 U.S.C. §2244(d)(2).

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The caption to this case contains the names of all parties to this proceeding, both here and before the United States Court of Appeals for the Eleventh Circuit. No corporations or parent corporations are involved in this matter.

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OPINIONS BELOW

The orders of the court of appeals denying Petitioner's motion for a certificate of appealability (App. A-3 - A-4) and motion for reconsideration (App. A-1 - A-2) are unreported. The orders of the district court denying Petitioner's petition for habeas corpus (App. A-7 - A-14) and motion for certificate of appealability (App. A-5 - A-6) are unreported.

JURISDICTION

The order of the court of appeals was entered on July 19, 2000. A timely motion for reconsideration was denied on September 25, 2000. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2244(d) of Title 28, U.S. Code provides in pertinent part:

> (1) A 1-year statute of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. . . .
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period

> of limitation under this subsection.

Section 2253(c) of Title 28, U.S. Code provides in pertinent part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

This case has important ramifications for the lower federal courts' application of the federal habeas corpus statutes and the gatekeeping function of 28 U.S.C. § 2253(c). It involves the entitlement of a federal habeas corpus petitioner to appeal a district court finding of procedural bar that is, at the very least, "debatable among jurists of reason." Petitioner ("Rogers") sought state post-conviction relief under Fla. R. Crim. P. 3.850, alleging that the State of Florida ("State") violated *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to produce a variety of exculpatory materials to Rogers before trial.[1] The federal district court held that Rogers's federal habeas corpus petition was time-barred because the court concluded that Rogers's state post-conviction motion under Fla. R. Crim. P. 3.850 was untimely under Florida law, even though the state court had assumed that Rogers had valid arguments for avoiding state procedural bar and had instead denied his motion on the merits. The district court and later the Eleventh Circuit denied Rogers a certificate of appealability.

The lower courts' refusal to permit an appeal was in error as a matter of law, and conflicts with

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[1] In a separate state petition for writ of habeas corpus, Rogers also alleged that he was denied his right to the effective assistance of appellate counsel through counsel's failure to raise two obvious claims of reversible error on direct appeal: (1) that the trial court improperly considered evidence of unproven crimes in sentencing Rogers, in violation of settled Florida law; and (2) that the jury's verdict was tainted by impermissible fear of the defendant. That separate habeas corpus petition is not at issue here.

this Court's decisions that require the issuance of a certificate of appealability whenever "jurists of reason" could differ about the appropriate outcome. The state trial court that heard Rogers's *Brady* claim -- and the only state court to issue a written opinion explaining its holding -- rejected Rogers's *Brady* claim on the merits after accepting as true Rogers's arguments for avoiding a state procedural bar. That state post-conviction proceeding -- in which the state court decided Rogers's *Brady* claim on the merits instead of rejecting it on procedural grounds -- was a "properly filed" state post-conviction proceeding that tolled the federal habeas corpus limitation period. The district court's conclusion that the state proceeding was untimely contradicted the state court's own conclusion as to timeliness. Because this issue is self-evidently one on which "jurists of reason" can disagree, the Eleventh Circuit's denial of a certificate of appealability, in these circumstances, cannot be reconciled with this Court's broad and lenient reading of 28 U.S.C. § 2253(c).

Review by this Court is warranted to ensure that the lower courts are properly applying the standards for issuance of a certificate of appealability. Only a case such as this one, where a certificate of appealability has been wrongly denied, can squarely frame the question of when an appeal should be permitted from the denial of a federal habeas corpus petition.

I. THE STATE POST-CONVICTION PROCEEDING

Rogers's federal habeas corpus petition challenges a March 1983 conviction arising out of the robbery of a Captain D's seafood restaurant in Orange

County, Florida, for which Rogers was sentenced to 100 years' incarceration. That conviction was later used as substantive evidence in a murder case for which Rogers has been sentenced to death, and it was used to support an aggravating factor on which his death sentence is based.[2]

The Brady claim advanced in Rogers's federal habeas corpus petition was first raised in Florida state court on April 23, 1997, in a post-conviction motion filed pursuant to Fla. R. Crim. P. 3.850. The state trial court conducted a hearing on July 16, 1998, limited to the issue of whether Rogers's claims were procedurally barred under state law.

Under the terms of Fla. R. Crim. P. 3.850, Rogers was required to assert any collateral challenge to his conviction within two years of the date his judgment and sentence became final. However, Florida law expressly recognizes an exception to the two-year limitations period when "facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." Fla. R. Crim. P. 3.850(b)(3). Florida law also recognizes an exception if "the defendant retained counsel to timely file a 3.850 motion and counsel,

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[2] Both convictions were largely based upon testimony of a disgruntled former business partner of Rogers, who confessed to a string of robberies, including that in which the murder occurred, for which he ultimately served only a minor sentence under a plea bargain with the State. Before being accused of these crimes by his former partner, Rogers had no criminal record and continues to assert his innocence of the crimes at issue.

through neglect, failed to file the motion." *Id.* Rogers presented uncontroverted evidence (a) that the evidence supporting his *Brady* claim was not discovered until well after that two-year period, and (b) that he was actively misled by his state-appointed lawyers into not filing a timely Fla. R. Crim. P. 3.850 motion after the discovery of that *Brady* material. The evidence presented by Rogers showed that his lawyers had affirmatively promised him that they would file a timely Fla. R. Crim. P. 3.850 motion, and then failed to do so.

This evidence, if accepted, was clearly sufficient to avoid a procedural bar under Florida law. The limitations periods governing Florida post-conviction proceedings under Fla. R. Crim. P. 3.850 are subject to equitable tolling, in cases such as Rogers's, where the facts underlying the claims were unknown or the defendant was actively misled by his lawyers. *See, e.g., Steinhorst v. State*, 636 So. 2d 498, 500 (Fla. 1994) (per curiam); *Brown v. State*, 596 So. 2d 1026, 1027-28 (Fla. 1992); *Haag v. State*, 591 So. 2d 614, 616 (Fla. 1992); *Demps v. State*, 696 So. 2d 1296, 1299 (Fla. Dist. Ct. App. 1997); *Porter v. State*, 670 So. 2d 1126, 1127 (Fla. Dist. Ct. App. 1996).

The state trial court issued a written decision on November 30, 1998, which denied Rogers's Fla. R. Crim. P. 3.850 motion on the merits and <u>not</u> on grounds of procedural bar. (App. A-24 - A-25.) The state court initially noted that, strictly applying Fla. R. Crim. P. 3.850, the motion was "outside the express two-year limitation provision in the rule" and was "several years late." (App. A-20 - A-21.) But the court then proceeded to recount Rogers's arguments that these claims could not have been raised within two years after his conviction became final, because the facts underlying the claims

were not known until CCR (the Capital Collateral Representative, Rogers's lawyers at the time) started to uncover the police reports in April 1989. (App. A-20 - A-21.) The court then discussed Rogers's contention that his CCR lawyers had misled him for several years into believing that they would file a timely Rule 3.850 motion on his behalf, which would warrant tolling of the limitations period in the interest of "fairness and equity." (App. A-22.) Although it did not explicitly resolve this argument, the court "assum[ed] all of what [Rogers] has alleged is true." (App. A-23.) The state court therefore never rejected Rogers's equitable tolling argument and did not find that the motion was untimely. Rather, for purposes of analysis, the court accepted Rogers's arguments that the procedural bar did not apply.

After assuming the validity of Rogers's tolling argument, the state court then proceeded to address his *Brady* claim on the merits. (App. A-24 - A-25.) The court concluded that Rogers's *Brady* claim was "flaw[ed]," and that the outcome of Rogers's trial "would have been no different" if the State had complied with its obligation under *Brady* to turn over the exculpatory material. (App. A-24.) The state court determined that the evidence the State failed to turn over to Rogers was not "'material' as contemplated by *Brady*." (*Id.*) While Rogers disputes the state court's conclusions on the merits of his *Brady* claim, the important point is that the state court did, in fact, address and decide the merits of his Rule 3.850 motion. Immediately after addressing and rejecting the merits of Rogers's *Brady* claim, the state court ruled that, "[b]ased on the foregoing," the Rule 3.850 motion was denied. (App. A-25.) The state court's ruling thus did not state that Rogers's *Brady* claim was denied because it was untimely under state law. To the

contrary, the court's conclusion follows immediately after its discussion of the merits of Rogers's *Brady* claim.

Rogers filed a timely notice of appeal to the Florida Fifth District Court of Appeal. On August 10, 1999, the District Court of Appeal, without opinion, affirmed the trial court's denial of the Rule 3.850 motion. (App. A-15 - A-16.) Rogers sought discretionary review in the Florida Supreme Court, which was denied on October 4, 1999. (App. A-28 - A-29.)

II. THE FEDERAL HABEAS CORPUS PROCEEDING

Rogers filed a federal habeas corpus petition on October 1, 1999, three days before the entry of the Florida Supreme Court's decision denying Rogers's petition for discretionary review of the District Court of Appeal's order affirming the state trial court's denial of Rogers's Fla. R. Crim. P. 3.850 motion. Thus, from April 23, 1997 through October 4, 1999, Rogers had a "properly filed" state post-conviction proceeding pending in state court.

The State responded to Rogers's habeas corpus petition by arguing that the petition was untimely under the federal habeas corpus statute of limitations enacted by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), codified at 28 U.S.C. § 2244(d). Section 2244(d)(1) provides that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." The federal courts of appeals consistently have held that in cases such as this one, where the habeas corpus petitioner's conviction became final prior to enactment of the AEDPA, such petitioners

have one year from the date of the AEDPA's enactment – April 24, 1996 -- to file a federal habeas corpus petition.

Rogers filed his Fla. R. Crim. P. 3.850 motion on April 23, 1997.[3] The federal habeas corpus statute of limitations provides that the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). Thus, if Rogers's Fla. R. Crim. P. 3.850 motion was a "properly filed application" for state post-conviction relief, the federal limitations period for all claims was tolled until after Rogers filed his federal habeas corpus petition on October 1, 1999.

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[3] Some courts have stated in dicta that, for purposes of applying the AEDPA limitation, one year from April 24, 1996 is April 23, 1997. *See, e.g., Guenther v. Holt*, 173 F.3d 1328, 1331 (11th Cir. 1999). Other courts have stated in dicta that one year after April 24, 1996 is April 24, 1997. *See, e.g., United States v. Cicero*, 214 F.3d 199, 202 (D.C. Cir. 2000); *Rogers v. United States*, 180 F.3d 349, 355 (1st Cir. 1999). The only courts to have squarely addressed the issue, where the exact date was dispositive, have held that the one-year period from April 24, 1996 expired on April 24, 1997. *See Hernandez v. Caldwell*, 225 F.3d 435 (4th Cir. 2000); *Moore v. United States*, 173 F.3d 1131, 1135 (8th Cir. 1999); *Flanagan v. Johnson*, 154 F.3d 196, 200-02 (5th Cir. 1998). In fact, under Fed. R. Civ. P. 6(a), the one-year limitations period should not begin to run until April 25, 1996 (the day after the AEDPA was enacted), and thus should not expire until one year later, April 25, 1997. By filing on April 23, 1997, Rogers met the one-year deadline under any of these interpretations.

The district court denied and dismissed Rogers's habeas corpus petition on the ground that the "petition was not timely filed and must be denied on timeliness grounds." (App. A11.) The district court based its conclusion on the fact that Rogers's Fla. R. Crim. P. 3.850 motion was filed more than two years after his conviction became final and therefore was not a "properly filed" state post-conviction proceeding under 28 U.S.C. § 2244(d)(2). In so holding, the district court ignored the fact that (1) Rogers had argued before the Florida state court that the state two-year limitations period was equitably tolled and (2) the state court had assumed the validity of Rogers's arguments for equitable tolling and instead rejected Rogers's *Brady* claim on the merits. The district court's opinion did not take into account the fact that the state court had addressed and resolved Rogers's claim on the merits, nor did it explain how a state post-conviction petition that was reached and resolved on the merits could be anything but a "properly filed" state proceeding under § 2244(d)(2).

Rogers thereafter sought a certificate of appealability in the district court, arguing that -- at the very least -- "jurists of reason" could disagree as to whether the state court's decision on the merits of Rogers's *Brady* claim meant that his state post-conviction petition was "properly filed" under state law, such that his federal habeas corpus petition would not be procedurally barred. However, with no discussion whatsoever and with no citation to any case law, the district court denied Rogers's motion for a certificate of appealability. (App. A-5.)

Rogers then sought a certificate of appealability from the court of appeals. Again, Rogers argued that a certificate of appealability should be

granted because, at the very least, reasonable jurists could disagree as to whether the state court had found Rogers's Fla. R. Crim. P. 3.850 motion to be time-barred or rather had decided the motion on the merits. The court of appeals denied Rogers's motion for a certificate of appealability in a one-paragraph order, citing this Court's holding in *Slack v. McDaniel*, --- U.S. ---, 120 S. Ct. 1595 (2000). (App. A-3 - A-4.) Rogers filed a motion for reconsideration, arguing that, under *Slack*, a certificate of appealability should issue whenever "reasonable jurists" would find the district court's ruling "debatable" -- a standard that clearly has been met in this case. The court of appeals denied Rogers's motion in a one-sentence order, again citing *Slack* and providing no analysis of why Rogers's claim failed to present a debatable issue among jurists of reason. (App. A-1 - A-2.)

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE.

Although this case has a complicated procedural past, the issue presented here is a simple one: may the lower federal courts disregard this Court's clear interpretation of the statutory requirement for a certificate of appealability and effectively deny habeas corpus petitioners the right to appeal in cases where the district court's holding is, at the very least, debatable? This case has significant implications for the reach of 28 U.S.C. § 2253(c)'s requirement for a certificate of appealability. In cases from the pre-AEDPA era, when petitioners required a "certificate of probable cause," through the recent post-AEDPA *Slack* case, this Court has held that the requirement of a certificate of appealability imposes a low threshold on federal habeas corpus

petitioners. The decisions of the lower courts in this case, denying a certificate of appealability, cannot be reconciled with this Court's precedent, and take an improperly constricted view of a federal habeas petitioner's right to appeal.

The court of appeals thus has "decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c). The only way to ensure that the lower federal courts properly apply this Court's decisions interpreting § 2253(c) is to review a case such as this one, where the court of appeals has misapplied this Court's holdings and has wrongly denied a certificate of appealability. It is troubling and contrary to this Court's precedent to preclude appeal by a federal habeas corpus petitioner in the circumstances presented here.

II. THE ELEVENTH CIRCUIT'S INTERPRETATION OF THE CERTIFICATE OF APPEALABILITY REQUIREMENT CONTRADICTS THIS COURT'S PRIOR HOLDINGS AND THE WELL-ESTABLISHED MEANING OF THE STATUTORY REQUIREMENT.

A. The Standard for Issuing a Certificate of Appealability is Extremely Lenient.

The AEDPA provides the standard governing the issuance of a certificate of appealability. The statute provides that a "certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

This Court recently addressed the appropriate standard for issuing a certificate of appealability under 28 U.S.C. § 2253(c). In *Slack v. McDaniel*, --- U.S. ---, 120 S. Ct. 1595 (2000), the Court provided lower federal courts with a clear standard to apply in situations such as this, where the federal district court has denied a petitioner's habeas corpus petition on procedural grounds without reaching the merits of the claims.

> When the district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Id. at 1604. This standard requires only a showing that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 1603-04 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). Thus, it is clear from this Court's holding in *Slack* that lower federal courts are to apply a lenient standard when

deciding whether to grant a certificate of appealability under § 2253(c). The question of the right to appeal should not be converted into a premature adjudication of the merits.[4]

Although this Court has had only one prior opportunity to interpret § 2253(c)'s post-AEDPA certificate of appealability requirement, the Court has provided ample guidance on the statute's scope in pre-AEDPA holdings concerning the former requirement of a "certificate of probable cause." Before the AEDPA, § 2253 permitted an appeal from the denial of a habeas corpus petition only upon the issuance of a "certificate of probable cause." Section 2253 provided that "[i]n a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had," if the petitioner obtained a certificate of probable cause from "the justice or judge who rendered the order or a circuit justice or judge." This Court held in *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983), that courts should issue such a certificate only if a petitioner could "make a 'substantial showing of the denial of [a] federal right' " (citations omitted).

As this Court made clear in *Slack*, the certificate of appealability requirement of § 2253(c)

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[4] In *Slack*, the federal district court dismissed claims contained in the petitioner's habeas corpus petition that had not been raised in an earlier habeas corpus petition that in turn had been dismissed for failure to exhaust available state remedies. This Court held that the district court's dismissal on procedural grounds was erroneous. *Slack*, 120 S. Ct. at 1604-05.

incorporates earlier habeas corpus principles and was intended to adopt the requirements set forth in *Barefoot*. "Except for substituting the word 'constitutional' for the word 'federal,' § 2253 is a codification of the [certificate of probable cause] standard announced in *Barefoot* . . . ." *Slack*, 120 S. Ct. at 1605.

In *Barefoot*, the Court set forth several ways in which a petitioner could make the "substantial showing" necessary for the issuance of a certificate of probable cause. To meet this "threshold inquiry," *Slack*, 120 S. Ct. at 1604, a petitioner needed only to "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. at 893 n. 4 (internal quotation marks omitted). Therefore, it was <u>not</u> necessary for a petitioner to demonstrate that he should prevail on appeal in order to secure a certificate of probable cause. Rather, the inquiry was simply whether a petitioner had presented a "debatable" question whether the district court's holding was correct. Indeed, this Court has emphasized that, in examining a petitioner's application to appeal from the denial of a habeas corpus petition, "obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." *Id.* at 893 n. 4 (internal quotation marks omitted).

It is clear from *Barefoot* that federal courts are barred from equating the standard for obtaining permission to appeal with the standard for granting a writ of habeas corpus. Although the certificate of appealability requirement is designed as a gatekeeping mechanism to prevent the courts from devoting scarce judicial resources to frivolous issues, at the same time the

requirement cannot and should not be used as a preliminary means of resolving debatable issues without benefit of briefing and argument on appeal. In fact, many courts of appeals have granted certificates of appealability in cases where they ultimately have rejected claims on the merits. *See, e.g., Solis v. Garcia*, 219 F.3d 922, 925 (9th Cir. 2000); *Schell v. Witek*, 218 F.3d 1017, 1021 n. 4 (9th Cir. 2000) (en banc); *Mackey v. Dutton*, 217 F.3d 399, 406 (6th Cir. 2000); *Franklin v. Hightower*, 215 F.3d 1196, 1199 (11th Cir. 2000); *Tillman v. Cook*, 215 F.3d 1116, 1120 (10th Cir. 2000). Thus, "the showing a petitioner must make to be heard on appeal is less than that to obtain relief." *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000).

Furthermore, this Court and the courts of appeals have stressed that any doubts should be resolved in the petitioner's favor, particularly where, as here, the conviction was later used to support a death sentence. "In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause . . . ." *Id.* at 893; *see also Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000) ("the severity of the penalty may be considered" in issuing a certificate of appealability); *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997) ("we may properly consider the severity of the penalty in making the determination" on a request for a certificate of appealability); *Porter v. Gramly*, 112 F.3d 1308, 1312 (7th Cir. 1997) (finding that claim presented a "debatable" issue, "especially in light of the death sentence that hangs over [petitioner's] head").

B. The Eleventh Circuit's Decision Conflicts with this Court's Holdings and Effectively Denies Habeas Corpus Petitioners the Right to Appeal Even in Cases Where

They Have Raised a Clearly "Debatable" Claim.

It is beyond dispute that a "properly filed" state post-conviction proceeding tolls the federal limitation period for purposes of 28 U.S.C. § 2244(d)(2). It is also undisputed that Rogers had a state post-conviction proceeding pending from April 23, 1997 through October 4, 1999, and that Rogers's federal habeas corpus petition was filed on October 1, 1999.

The court of appeals and the district court below failed to address the pendency of Rogers's state post-conviction motion and its effect in tolling the federal statute of limitations. As stated above, the Florida state court accepted, for purposes of analysis, Rogers's arguments that the state post-conviction statute of limitations was tolled -- arguments that if accepted would render his Fla. R. Crim. P. 3.850 proceeding timely under state law (and hence undisputedly a "properly filed" proceeding for purposes of 28 U.S.C. § 2254(d)(2)). The Florida court stated in its written opinion that it "assum[ed] all of what [Rogers] has alleged is true." (App. A-23.) The state court therefore accepted that Rogers's post-conviction proceeding was timely for purposes of analysis, and then proceeded to address and reject Rogers's *Brady* claim on the merits. The state court therefore did not find that the Fla. R. 3.850 motion was procedurally barred.

At the very least, the state court's opinion amounts to an implicit decision that Rogers's Fla. R. 3.850 petition was a "properly filed" state post-conviction proceeding. The pendency of that proceeding tolled the federal limitations period through, and beyond, October 1, 1999, the date on which Rogers filed his federal habeas

corpus petition. Because the state court reached and rejected Rogers's claim on the merits, confirming it to be a "properly filed" proceeding for purposes of 28 U.S.C. § 2244(d)(2), the court of appeals erred in concluding that Rogers's federal habeas corpus petition is barred under the federal statute of limitations. And it defies common sense for the court of appeals to hold that "reasonable jurists could [not] debate" whether the state court proceeding was "properly filed," when the state court disposed of a petitioner's claims on the merits, not on the basis of any procedural default under state law. *Slack*, 120 S. Ct. at 1603.

The court of appeals also failed to recognize that a petitioner has raised a "debatable issue" when other courts that have faced similar factual situations have resolved them differently from the district court below. In *Lozada v. Deeds*, 498 U.S. 430 (1991) (per curiam), this Court held that, even though a question may be well-settled in a particular circuit, the petitioner satisfies the threshold standard for the certificate of probable cause where a court in another circuit has reached a different conclusion. In *Lozada*, the petitioner had filed a habeas corpus petition alleging ineffective assistance of counsel. The district court and court of appeals held that the petitioner's failure to allege any prejudice arising from the ineffective assistance doomed his claim under well-established Ninth Circuit law, and so declined to issue a certificate of probable cause. *Id.* at 431. This Court reversed, holding that "the issue of prejudice caused by the alleged denial of the right to appeal could be resolved in a different manner from the one followed by the District Court," because "at least two Courts of Appeals have presumed prejudice in this situation." *Id.* at 432. Thus, the fact that a court in another circuit has decided a comparable issue in a

different manner creates a "debatable issue" under the *Barefoot* standard.

Not surprisingly, other courts faced with facts comparable to those raised here have issued certificates of appealability. In *Lambright*, for instance, the Ninth Circuit issued a certificate of appealability when it was "arguable that the state court adjudicated the merits of the claim," holding that the petitioner "met the procedural test the Court established in *Slack*." *Lambright*, 220 F.3d at 1027.

And in *Smith v. Ward*, 209 F.3d 383 (5th Cir. 2000), the Fifth Circuit issued a certificate of appealability in a case where the state court dismissed a petitioner's state post-conviction petition as untimely under state law. In *Smith*, the court of appeals acknowledged that, under circuit precedent, a state post-conviction petition would be deemed "properly filed" under 28 U.S.C. § 2244(d)(2) only if it was "'submitted according to the state's procedural requirements, such as the rules governing notice and the time and place of filing.' " *Villegas v. Johnson*, 184 F.3d 467, 469 (5th Cir. 1999). The state court in *Smith* rejected the petitioner's claim as untimely without ever reaching the merits. Nevertheless, the court of appeals held that an untimely state post-conviction petition will be deemed a "properly filed" state proceeding as long as the state court "accept[s] a prisoner's application for filing and review[s] it to determine whether any of the statutory exceptions to untimely filing are applicable." *Smith*, 209 F.3d at 385; *see also Hall v. Cain*, 220 F.3d 1022 (5th Cir. 2000) (holding that a state post-conviction proceeding that ultimately was rejected by the state court as repetitive was a "properly filed" state proceeding, as long as the state court "would have to review [the claims] to discern

whether they actually were repetitive and thus not subject to review").

Under the *Lambright* and *Smith* holdings, Rogers's Fla. R. Crim. P. 3.850 petition would be deemed a "properly filed" state post-conviction proceeding. As in *Lambright*, there is -- at the very least -- an ambiguity as to whether the Florida state court accepted Rogers's tolling arguments and decided his *Brady* claim on the merits. And like the *Smith* case, even if the state court had rejected Rogers's *Brady* claim as untimely under state law, it is clear that the state court analyzed the exceptions to the state statute of limitations and considered whether such exceptions were applicable to the facts of this case. Because both the Ninth Circuit in *Lambright* and the Fifth Circuit in *Smith* resolved virtually identical cases by issuing certificates of appealability -- the opposite of the result reached by the district court below -- the court of appeals erred in concluding that Rogers failed to present even a "debatable issue" that would support issuance of a certificate of appealability.

In sum, Rogers had pending a "properly filed" state court proceeding that tolled the federal statute of limitations until October 4, 1999 -- after Rogers filed his federal habeas corpus petition. The court of appeals was utterly wrong in its analysis because it overlooked the significance of the pending state proceeding in relation to the tolling of the one-year federal statute. The court of appeals also failed to follow this Court's precedents that require courts to presume that an ambiguous state court decision rested on federal grounds, not state procedural rules, and by inference was a "properly filed" state post-conviction proceeding. Finally, the court of appeals clearly erred in denying a certificate of appealability when other courts faced with similar facts have granted

such certificates. Because other courts have resolved similar disputes differently, by definition it is "debatable whether the district court was correct in its procedural ruling." *Slack*, 120 S. Ct. at 1604.[5]

CONCLUSION

Justice Kennedy's opinion for the Court in *Slack*, 120 S. Ct. at 1603, provides a fitting conclusion for this petition: "The writ of habeas corpus plays a vital role in protecting constitutional rights. In setting forth the preconditions for issuance of a [certificate of appealability] under § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal."

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[5] *Slack* states that a certificate of appealability will not be granted unless the petitioner shows both that the district court erred in its procedural ruling and that "the petition states a valid claim of the denial of a constitutional right." Because the courts below did not address the merits of Rogers's claims, it is appropriate for the court of appeals to address that issue upon remand. *Slack*, 120 S. Ct. at 1604. Several courts of appeals have held that a petitioner will satisfy the merits showing as long as a "'quick look' at the face of the complaint . . . determine[s] [that] the petitioner has 'facially allege[d] the denial of a constitutional right.' " *Lambright*, 220 F.3d at 1026 (citing *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir. 2000)); *see also Franklin v. Hightower*, 215 F.3d 1196, 1200 (11th Cir. 2000). Clearly, Rogers's habeas corpus petition "facially alleges" two legitimate claims, and the court of appeals would have no basis for refusing to grant a certificate of appealability on the merits prong of the *Slack* test.

The petition should be granted.

Respectfully submitted,

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January 15, 2001

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11743-E

JERRY LANE ROGERS, SR.,

Petitioner-Appellant,

versus

MICHAEL W. MOORE, Secretary of the Florida Department of Corrections, D.T. O'NEILL, Warden, Union Correctional Institution, et al.,

Respondents-Appellees

Appeal from the United States District Court for the Middle District of Florida

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Before EDMONDSON and Hull, Circuit Judges,

BY THE COURT:

Upon reconsideration of this Court's order dated July 19, 2000, appellant's motion for a certificate of appealability is DENIED because appellant has not made the requisite showing. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 120 S.Ct. 1595, 1600-01 (2000).

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-11743-E

JERRY LANE ROGERS, SR.,

Petitioner-Appellant,

versus

MICHAEL W. MOORE, Secretary of the Florida Department of Corrections, D.T. O'NEILL, Warden, Union Correctional Institution, et al.,

Respondents-Appellees

Appeal from the United States District Court for the Middle District of Florida

---

ORDER:

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issue that was the basis for the district

court's order of dismissal. See Slack v. McDaniel, 120 S.Ct. 1595, 1604 (2000). Because his petition is plainly barred by 28 U.S.C. § 2254's one-year statute of limitations, appellant has failed to satisfy the second prong of Slack. Accordingly, the motion for a certificate of appealability is DENIED.

/s/ EMMETT R. COX
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JERRY L. ROGERS, SR.,

Petition,

v. Case No. 6:99-cv-1251-Orl-19A

MICHAEL W. MOORE, et al.,

Respondents.

ORDER

This case is before the Court on the following motion:

MOTION: PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY (Doc. No. 21) **FILED: April 3, 2000**
THEREON it is ORDERED that the motion is DENIED.

Petitioner has not made a substantial showing of the deprivation of any federal constitutional right.

DONE AND ORDERED in Chambers at Orlando, Florida, this 5th day of April, 2000.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JERRY L. ROGERS, SR.,

Petitioner,

vs **Case No. 6:99-cv-1251-Orl-19A**

MICHAEL W. MOORE, et al.,

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the petitioner, Jerry L. Rogers, Sr., take nothing and the action be dismissed.

Date: March 6, 2000 SHERYL L. LOESCH, CLERK

By: /s/ M. Pleicones
M. Pleicones, Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JERRY L. ROGERS, SR.

Petitioner

v. CASE NO. 6:99-cv-1251-Orl-19A

MICHAEL W. MOORE, et al.,

Respondents.

ORDER

Petitioner initiated this action for habeas corpus relief pursuant to 28 U.S.C. section 2254. Upon consideration of the petition, the Court ordered Respondents to show cause why the relief sought in the petition should not be granted. Thereafter, Respondents filed a timely reply to the petition for writ of habeas corpus in compliance with this Court's instructions and with the *Rules Governing Section 2254 Cases in the Unite States District Courts* (Doc. No. 13, filed December 23, 1999).

Procedural History

Petitioner was charged by information with armed robbery. A jury trial was held, and Petitioner was found guilty as charged in the information. On March 4, 1983, the trial court adjudicated Petitioner guilty of armed robbery and sentenced Petitioner to imprisonment for a term of 100 years. Petitioner filed a direct appeal with the

Florida Fifth District Court of Appeal, which affirmed *per curiam* on March 20, 1984. Mandate was issued on April 6, 1984.

On March 12, 1985, Petitioner filed a motion for postconviction relief with the state trial court,[1] which was denied on June 24, 1985. Petitioner appealed the denial, and the state appellate court affirmed the denial *per curiam* on July 23, 1985. Mandate was issued on August 9, 1985.

On December 27, 1985, Petitioner filed a second motion for postconviction relief with the state trial court,[2] which was denied on March 31, 1986. Petitioner appealed the denial and the state appellate court affirmed the denial *per curiam* on August 5, 1986. Mandate was issued on August 22, 1986.

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[1] Although the motion was actually filed with the state trial court on March 20, 1985, under the "mailbox rule," it appears that the motion would be deemed filed on March 12, 1985, the date when the motion was signed and presumably submitted to the prison authorities. *See Haag v. State*, 591 So.2d 614, 617 (Fla. 1992) ("Under the mailbox rule, a petition or notice of appeal filed by a pro se inmate is deemed filed at the moment in time when the inmate loses control over the document by entrusting its further delivery or procession to agents of the state. Usually, this point occurs when the inmate places the document in the hands of prison officials."); *see also Burns v. Morton*, 134 F.3d 109, 113 (3rd Cir. 1997) ("[W]e hold that a pro se prisoner's habeas petition is deemed filed at the moment he delivers it to prison officials for mailing to the district court.").

[2] That was the filing date under the mailbox rule.

On April 23, 1997, Petitioner filed a third motion for postconviction relief with the state trial court, which was denied on November 30, 1998. Petitioner appealed the denial, and the state appellate court affirmed the denial *per curiam* on August 10, 1999. Mandate was issued on August 27, 1999.

On December 28, 1998, Petitioner filed a petition for writ of habeas corpus with the state appellate court, which was denied on January 11, 1999. On September 17, 1999, Petitioner filed a notice to invoke the discretionary jurisdiction of the Supreme Court of Florida. On October 4, 1999, the Supreme Court of Florida dismissed the case for lack of jurisdiction.

Petitioner's Habeas Petition is Untimely

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment of conviction became final by the conclusion in direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action.

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 2244(d)(1) went into effect on April 24, 1996. Thus, a prisoner, like Petitioner, whose conviction became final prior to April 24, 1996, had until April 23, 1997, absent any tolling, to file a federal habeas petition regarding such conviction. *Wilcox v. Florida Department of Corrections*, 158 F.3d 1209, 1211 (11th Cir. 1998) (petitioners whose convictions become final before the enactment of the AEDPA must be provided a reasonable time to file their section 2254 petitions, and one year from the effective date is a reasonable period). Petitioner's initial federal habeas petition was file stamped by the Clerk's office on October 1, 1999.

Pursuant to section 2244(d)(2), the one year period is "tolled" for the time during which a *properly filled* state postconviction or collateral proceeding is pending. However, there was no tolling in this case. Therefore, Petitioner's October 1, 1999, habeas petition was not timely filed and must be denied on timeliness grounds.

The Court is aware that Petitioner filed his third Rule 3.850 motion on April 23, 1997; that the state trial court denied the motion on November 30, 1998, and that the state appellate court affirmed the denial on August 10, 1999 (issuing mandate on August 27, 1999).

However, the third motion for postconviction relief was not properly filed under section 2244(d)(2). "[A] properly filed application" under section 2244(d)(2) "is one submitted according to the state's procedural requirements such as the rules governing the time and place of filing." *Lavasz v. Vaughn*, 134 F.3d 146, 148 (3rd Cir. 1998). Florida Rule of Criminal Procedure 3.850 provides that a motion for postconviction relief must be filed with the clerk of the court in which he (or she) was convicted and sentenced and within two years of when the judgment and sentence become final. Here, clearly Petitioner did not file his third motion for postconviction relief within the two year time limit proscribed by Rule 3.850. Therefore, his third motion for postconviction relief was not "properly filed" under section 2244(d)(2). *See United States ex rel Morgan v. Gilmore*, 26 F. Supp.2d 1035, 1038 (N.D. Ill. 1998) (an untimely state court petition for leave to appeal the denial of a postconviction petition did not toll the limitations period for filing a federal habeas corpus petition; an untimely state court petitioner was not a "properly filed application" within the meaning of the tolling provision).[3]

Similarly, the petition for writ of habeas corpus filed with the state appellate court had no tolling

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[3] Moreover, the trial court found that Petitioner's third motion for postconviction relief was untimely filed. Thus, on the basis of the trial court's finding, the third motion for postconviction relief was not "properly filed" under section 2244(d)(2). *See Webster v. Moore*, 199 F.3d 1256, 1257 (11th Cir. 2000) (the state court's holding that a petitioner's motion for postconviction relief was time-barred is "due deference").

effect. Since the one year period concluded before Petitioner initiated his state habeas petition, the tolling provision of section 2244(d)(2) does not apply. *See Newton v. Strack*, No. CV 97-2812 (RJD), 1997 WL 752348, at *2 (E.D.N.Y. October 15, 1997) ("if the state motion were filed in excess of one year after the conviction becomes final), the state motion would be irrelevant to the limitation calculation. The timing of such a motion is relevant only if the motion precedes expiration of the applicable limitations period and therefore is made when a habeas petition could also timely be filed."); *see also Cromwell v. Keane*, 33 F. Supp. 2d 282, 285 (S.D.N.Y. 1999) ("Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations."); *Bingham v. Anderson*, 21 F. Supp. 2d 639, 641-42 (S.D. Miss. 1997) (if the petitioner does not "file the application for writ of habeas corpus in federal court within one year after the conviction becomes final, plus the period of time as to which a motion for post conviction relief is pending, [he or she] waive[s] or lose[s] [his or her] right to review by federal court.").

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. The Petition for Writ of Habeas Corpus filed by Jerry L. Rogers, Sr. is DENIED, and this case is **DISMISSED WITH PREJUDICE**. The Clerk of the Court shall enter judgment accordingly.

2. The Clerk of the Court is directed to close this case.

DONE AND ORDERED in Chambers at Orlando, Florida, this 3rd day of March 2000.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES
DISTRICT JUDGE

Copies to:
pslc 3/3/
Counsel of Record

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT
JULY TERM 1999

JERRY LAYNE ROGERS, SR.,

Appellant,

v. CASE NO. 98-3525

STATE OF FLORIDA,

Appellee.

Decision filed August 10, 1999

3.850 Appeal from the Circuit Court
for Orange County,
A. Thomas Mihok, Judge

John G. Buchanan, III, Timothy C.
Hester, Benedict M. Lenhart, Catherine E.
Long and Glen D. Weinstein of Covington &
Burling, Washington, D.C., and Jerrel Phillips,
Tallahassee, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Maximillian J.
Changus, Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

ANTOON, C.J., DAUKSCH AND HARRIS, JJ., concur.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO. CR82-1963
DIVISION 12

STATE OF FLORIDA,

Plaintiff,

vs.

JERRY LAYNE ROGERS,

Defendant.

_____/

ORDER DENYING MOTION FOR POST CONVICTION RELIEF

This matter came before the Court for consideration of Defendant's third Motion for Post Conviction Relief filed on April 23, 1997, pursuant to Rule 3.850, Florida Rules of Criminal Procedure. A hearing was held on this matter on July 16, 1998. After reviewing the file, motion, State's response to the motion, Defendant's Brief in Support of Argument that Procedural Bar Does Not Apply, State's response to that brief, and Defendant's reply to the State's response to that brief, and considering counsels' arguments, the Court concludes that summary denial without hearing is warranted.

FACTS

Defendant was charged along with co-defendant, Thomas McDermid, with the armed robbery of a Captain D's restaurant in Orlando. At trial, McDermid, who pled out, testified against Defendant. Defendant was found guilty and sentenced to 100 years in the Department of Corrections. This judgment and sentence was per curiam affirmed without opinion on appeal. See Rogers v. State, 447 So.2d 1369 (Fla. 5th DCA, 1984).

Defendant subsequently filed a Motion for Postconviction Relief, pursuant to Florida Rule of Criminal Procedure 3.850, on March 20, 1985, alleging ineffective assistance of counsel. That motion was denied by Order of June 24, 1995, and was affirmed on appeal. See Rogers v. State, 474 So. 2d 231 (Fla. 5th DCA 1985). Defendant then submitted a second rule 3.850 motion on January 3, 1986, again alleging ineffective assistance of counsel. That motion, by Order of March 28, 1986, was also denied and subsequently affirmed on appeal. See Rogers v. State, 492 So. 2d 678 (Fla. 5th DCA 1986).

In April of 1989, pursuant to section 27.7001, Florida Statutes, Capital Collateral Regional Counsel ("CCR") undertook to represent Defendant in regard to a December 1984 murder conviction entered in St. Johns County for which Defendant was sentenced to death. Defendant's prior conviction in the Captain D's robbery was used as an aggravating factor in his St. John's County death sentence. Defendant now submits this, his third, rule 3.850 motion challenging his conviction for the Captain D's Robbery.

ANALYSIS

Defendant alleges that co-defendant McDermid confessed (in an unrelated proceeding 10 months after Defendant was sentenced in this case) that he and Rogers not only committed the robbery for which they were charged in this case, but also committed many previous robberies together. Police reports and other documents reveal that witnesses to those previous robberies gave physical descriptions of the robbers that are inconsistent with Rogers's physical attributes, i.e., they described McDermid's accomplice as being taller than Rogers who is 5'4" tall. Other documents allegedly show that witnesses identified a different person, George William Cope, as McDermid's accomplice in the previous robberies. Cope's height falls within the range described by all of the witnesses.

Defendant thus argues that these documents the State had in its possession and failed to reveal to the defense were exculpatory in that they tend to show that because McDermid confessed that Rogers was his accomplice in the previous robberies, and because Cope, or some other person, more closely matches the described height of McDermid's accomplice in the previous robberies, it is likely that Cope, or some other person, was actually McDermid's accomplice in the previous robberies. It, therefore, follows that because McDermid's accomplice in the Captain D's robbery must be Cope, or some other person. Thus, Defendant contends that this evidence is exculpatory and was withheld by the State in violation of Brady v. Maryland, 373 U.S. 83 (1963).

Normally, a rule 3.850 motion must be filed within two years of final judgment and sentence. See Fla. R. Crim. P. 3.850(b). The two-year window for

Defendant's motion began to run on April 6, 1984, the date the mandate issued from the Fifth District Court of Appeal. See Rosado v. State 654 So. 2d 623, 624 (Fla. 5th DCA 1995) (holding rule 3.850 time rums from issuance of mandate). Thus, Defendant had until April 6, 1986, to file a timely rule 3.850 motion regarding this case. He did, in fact, file two postconviction motions during this period, and both were properly denied.

CCR, by Defendant's own admission, did not represent Defendant until April of 1989 (Def. Br. in Support of Arguments that Procedural Bar Does Not apply at 4). Therefore, in this case, CCR could not have brought a timely rule 3.850 motion on Defendant's behalf in any event because any rule 3.850 motion filed by CCR on Defendant's behalf would have been at least three years outside the express two-year limitation provision in the rule.

Nevertheless, Defendant claims his motion is saved in that it falls under the "newly discovered evidence" exception in rule 3.850(b)(1). Evidence is "newly discovered" when it could not have been discovered by a defendant or his attorney within the two-year time frame upon exercise of due diligence. See Fla. R. Crim. P. 3.850(b)(1). Still, the two-year limitations period applies to any newly discovered evidence in that a defendant is obligated to file his rule 3.850 motion within two years of actual discovery of that evidence. See Adams v. State, 543 So. 2d 1244, 1247 (Fla. 1989).

It appears that the police reports alleged to be "new evidence" could have been discovered, as the State contends, by a mere public records request. McDermid's confession in which he named Rogers as his accomplice in the previous robberies was made in

January 1984, well within two years following Rogers's March 1983 conviction for the Captain D's robbery. Had defense counsel exercised due diligence in investigating these previous robberies by simply submitting a public records request, counsel would have received all police reports relating to these robberies which counsel now alleges are exculpatory. See, e.g., Ziegler v. State, 632 So. 2d 48, 50 (Fla. 1993).

In addition, even if this evidence could not have been discovered by the exercise of the diligence, Defendant is still time barred because he did not alert the Court to this new evidence within two years of actual discovery. The State correctly points out that Defendant himself admits that his CCR representative made public record requests on his behalf to acquire the police reports in question. (Def. 3.850 Mot. at App. 39). This correspondence with various police agencies spans from October 1989 through March 1991. It indicates that, even using the last date of correspondence, Defendant should have alerted the Court to this newly discovered evidence by March of 1993. Presentation of his "new" evidence is, therefore, several year late.

Defendant also points to testimony obtained subsequent to his trial from Mathew Armitage and Roger Wimmer that he alleges implicates Cope in the Captain D's robbery. This evidence is also untimely. Nowhere does Defendant users that these witnesses were unavailable during discovery in Rogers's trial. Also, the substance of this testimony is minimally exculpatory at

best.[1] Introduction of this evidence clearly would not have changed the verdict rendered against Defendant.

To save his untimely motion, Defendant asserts that CCR was ineffective in its representation in that it did not file a rule 3.850 motion on Defendant's behalf within two years of its discovery of the Brady materials. (Def. 3.850 Mot. at 59-61). CCR did not represent Defendant in this case, only in the death case for which this conviction was used as an aggravator, however, Defendant alleges that CCR represented that they would investigate and collaterally attack the judgment in this case.[2] CCR counsel's alleged failure in this regard does not give rise to a claim of ineffective assistance of counsel upon which relief may be granted in a rule 3.850 motion.[3] Therefore, at best, Defendant cites counsel's error only as an appeal to this Court's sense of fairness and equity.

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[1] Armitage generally states that McDermid once told him about he and Cope "hitting a seafood place" sometime in the past. (Def. 3.850 Mot. at 48). Wimmer's testimony only suggests that he witnessed McDermid and Cope engage in drug and gun sales. (Def. 3.850 Mot. at 49).

[2] Defendant attaches to his motion a 1989 letter from CCR in which CCR assured Defendant they would raise all colorable claims attacking Defendant's sentence in this case and all other cases used as aggravators in his death case. (Def. 3.850 Mot. Ex. 43).

[3] "[C]laims of ineffective assistance of postconviction counsel do not present a valid basis for relief." Lambrix v. State, 698 So. 2d 247 (Fla. 1996) (citing Murray v. Giarratano, 492 U.S. 1 (1989) (death case); Pennsylvania v. Finley, 481 U.S. 551 (1987)).

Defendant, no doubt, recognizes that "fairness" is his best line of defense as it is argued in considerable detail in Defendant's Brief in Support of Argument that Procedural Bar Does Not Apply. In that brief, Defendant submits two theories for equitable relief: (1) that the two-year limitations period should be equitably tolled; and (2) that CCR's inaction and erroneous advice deprived him of his state-created right to effective legal representation.

"The doctrine of equitable tolling was developed to permit under certain circumstances the filing of a lawsuit that otherwise would be barred by a limitation period." Machules v. Department of Admin., 523 So. 2d 1132, 1133 (Fla. 1988) (citing Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1874)). Equitable tolling may properly be applied "when the [movant] has been misled or lulled into inaction" as is alleged here. Id. at 1134. Still, even assuming all of what Defendant has alleged is true, neither of his arguments demonstrate that denial of his motion as untimely would be unfair because even if this Court finds Defendant's motion to be timely filed, the allegations contained therein would not suffice to satisfy the four prong test set out in Brady v. Maryland, 373 U.S. 83 (1963).[4]

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[4] Defendants must show: (1) the State possessed material evidence favorable to him, (2) he did not possess the evidence nor could he have in the exercise of due diligence; (3) the evidence was suppressed by the State; (4) had the evidence been disclosed, a reasonable probability exists that the outcome of his trial would have been different. See e.g., Buenoano v. State, 708 So. 2d 941, 948 (Fla. 1998).

The evidence, even if viewed in a light most favorable to Defendant, is not "material" as contemplated by Brady. Evidence is material "only if there is a reasonable possibility that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985); see also Gorham v. State, 597 So.2d 782 (Fla. 1992). Had this evidence been disclosed to the defense, the defense would have been afforded the opportunity (absent any problems with admissibility) to make its logically strained argument that because McDermid's accomplice in previous crimes might have been George William Cope instead of Defendant, as McDermid claimed, then McDermid's accomplice in the Captain D's robbery must also be Cope. This argument, had the jury been able to understand it, would have been minimally exculpatory at best. The outcome of the result of Defendant's trial surely would have bee no different if it had been presented.

Also, a fundamental flaw exists in Defendant's argument. He claims that the police were in possession of exculpatory evidence that should have been turned over to him as part of discovery prior to his trial. However, the event that put Defendant on notice that the State possessed this evidence, so he claims, is an "omnibus confession" made by co-defendant McDermid in which McDermid claimed to have committed several previous robberies with Rogers. This confession was made ten months after Rogers was sentenced in this case. The police, therefore, were unaware of McDermid's confession at the time of the alleged Brady violation.

Defendant's Brady claim is incomplete without the link supplied by McDermid's confession.

Defendant argues in his motion that the police had in their possession substantial evidence implicating Cope, and not Rogers, in the previous robberies. At the time of discovery in Rogers's case, this evidence was not relevant to Rogers because McDermid had not yet confessed. In other words, absent McDermid's confession, there was no way for the State to know that the robberies they had investigated might bear, in any way, on Rogers's case. To argue otherwise suggests that the state is obligated to turn over all evidence of any other crime they have investigated previous to the one allegedly committed by a defendant in the hope that the defense will be able to find some nexus between the persons being investigated in those other crimes and the crime with which defendant is charged that exculpates the defendant. This Court will not support Defendant's suggestion.

Based on the foregoing, it is hereby **ORDERED:**

1. Defendant's Motion for Postconviction Relief is **DENIED**.

2. Defendant is advised that he has thirty (30) days from the rendition of this Order in which to appeal.

3. The Clerk of the Court shall promptly serve a copy of this Order upon Defendant including an appropriate certificate of service.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida this 30 day of Nov., 1998.

/s/ A. Thomas Mihok

Honorable A. Thomas Mihok
Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing order was furnished by U.S. mail/hand delivery to the Office of the State Attorney for the Ninth Judicial Circuit, Post Office Box 1673, Orlando, FL 32802 and to John G. Buchanan, III, Timothy C. Hester, Benedict M. Lenhart and Catherine E. Long, Attorneys for Defendant, Covington & Burling, 120 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20004, on this 30 day of Nov. 1998.

/s/ N. Royer
Judicial Assistant

SUPREME COURT OF FLORIDA

MONDAY, OCTOBER 4, 1999

JERRY LAYNE ROGERS,	**
Petitioner,	**CASE NO. 96,623
v.	**DISTRICT COURT OF APPEAL, **5TH DISTRICT - NO. 98-3525
STATE OF FLORIDA,	**
Respondent.	**

It appearing to the Court that the notice was not timely filed and further that it is without jurisdiction under Article V of the Florida Constitution, it is ordered that the cause is hereby dismissed on the Court's own motion. See Jenkins vs. State, 385 So. 2d 1356 (Fla. 1980).

No motion for rehearing will be entertained by the Court.

A True Copy H
TEST:

/s/ D. Causseaury
Debbie Causseaury
Acting Clerk,
Supreme Ct

cc: Hon. Marilyn N. Beuttenmuller, Clerk
Hon. Fran Carlton, Clerk
Hon. A. Thomas Mihok, Judge
Mr. John G. Buchanan, III
Mr. Timothy C. Hester
Mr. Benedict M. Lenhart
Ms. Catherine Long

Mr. Maximillian J. Changus